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Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 64

NUNZIO PROVENZANO AND
SALVATORE BRIGUGLIO,

Petitioners,

against

HAROLD W. FOLLETTE, Warden, Green Haven Prison, Stormville, New York, and DANIEL McMANN, Warden, Clinton Prison, Dannemora, New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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HAROLD W. FOLLETTE, Warden, Green Haven Prison, Stormville, New York, and DANIEL MCMANN, Warden, Clinton Prison, Dannemora, New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the order of the Court of Appeals for the Second Circuit entered herein on September 12, 1969, denying petitioners' motion for a certificate of probable cause under 28 U.S.C. § 2253.

Opinions Below

The Court of Appeals issued no opinion. The opinion of the District Court is, as yet, unreported and appears in the Appendix, *infra*, pp. 3a-12a.

Jurisdiction

The order of the Court of Appeals was entered on September 12, 1969 and appears in the Appendix, *infra*, p. 2a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions Involved

The constitutional provisions involved are the Fourth, Fifth and Sixth Amendments to the United States Constitution, *infra*, p. 1a.

Questions Presented

1. Whether the use of secret electronic listening devices to record conversations by telephone and at meetings with petitioners constituted an unlawful search and seizure and violated due process and the right to a fair trial under the Fourth, Fifth and Sixth Amendments where (a) there was no prior judicial approval of the use of such devices; (b) they were used without probable cause to believe that a crime had been committed; and (c) the devices were used by an agent of the District Attorney not known as such to the petitioners.

2. Whether the use at the trial of inaudible, incomplete and revised recordings and transcripts thereof denied petitioners due process and a fair trial under the Fifth and Sixth Amendments to the Constitution.

3. Whether petitioners' entrapment by the State denied them due process under the Fifth Amendment.

Statement of the Case

Petitioners filed an application in the District Court for the Southern District of New York for a writ of habeas corpus claiming that their state imprisonment was in violation of their constitutional rights. They had been convicted after a jury trial in the Supreme Court, New York County, of an attempt to commit grand larceny in the first degree (New York Penal Law, §§ 2, 1294), and were sentenced to imprisonment for two to four years. They exhausted all state remedies, both by appeal and by writ of error *coram nobis,* and have now served their sentences. The District Court correctly held that it had jurisdiction of the petition filed while petitioners were still in state custody. *Infra,* pp. 3a-4a.

The District Court denied the application for a writ of habeas corpus, as well as a certificate of probable cause, *infra,* p. 12a. Petitioners appealed and applied to the Court of Appeals for a certificate of probable cause pursuant to 28 U.S.C. § 2253 and Rule 27 of the Federal Rules of Appellate Procedure.

The Court of Appeals denied petitioners' motion, *infra,* p. 2a, and this petition seeks a review of that order of denial.

The conviction of petitioners was the outgrowth of a labor dispute in September, 1961 between Herbert Braun (who carried the recording device) and Local 810 of the Teamsters, whose members had struck his plant. On September 6, 1961, Mr. Braun telephoned Mr. Roper, an official of another Teamsters local to see "if there was anything we could do" (R. 715).[1] Braun was proposing bribery, since the police and labor board facilities were

[1] "R" refers to the record on appeal in the state courts which was before Judge Wyatt.

available as legitimate means of resolving his problems (Pet. 18).[2]

Three months later, Braun "with the encouragement of the District Attorney's office" (herein called the District Attorney) *infra,* p. 5a, telephoned Roper, who had not called him in the interim. That conversation was recorded by an electronic device supplied by the District Attorney (*ibid.*). Roper at first did not recall the earlier conversation. Later, he indicated that no one was interested in Braun's proposal (R. 724); indeed, Roper suggested that the National Labor Relations Board handle the matter (Pet. 18c; R. 725). Nevertheless, Braun pressed the issue of a bribe. As a result of his importunity, meetings were held among Braun, Roper and the appellants. The conversations were recorded by a Minifon device carried by Braun (Pet. 9) at the instance of the District Attorney (R. 76, 77). Written transcripts of the recordings were made by Braun and the District Attorney (Pet. 9). The tapes and transcripts were incomplete, as shown below, *infra,* p. 8.

First, long sections of the conversations were omitted as "inaudible" (Pet. 14(c); R. 1225, 1251, 1293). Second, the machine had been turned on and off during the conversations and, therefore, did not reveal the full conversations (Pet. 16(d); R. 760, 767, 777, 885-6, 979-80, 1126, 1203-4, 1212-13, 1219). Third, Braun had great difficulty in interpreting the tapes (Pet. 16(d); R. 881-882). Fourth, the transcripts were the product of numerous handwritten drafts, varying from each other in substance and in the names of the speakers (Pet. 16(e); R. 881-2). These drafts were prepared by Braun at the District Attorney's office over a period of ten months. Finally, the trial Court rejected the petitioners' request for an expert to test the

[2] "Pet." refers to the paragraphs of the petition for a writ of habeas corpus.

genuineness of the tapes and of the transcript (Pet. 16; R. 2115-17).

The District Court recognized the existence of facts which might cast doubt upon the transcripts, *infra*, p. 9a. But it said:

> "Assuming that the tapes were inaudible and incomplete, it must be shown that a very substantial and prejudical error occurred before there would be any justification in holding that constitutional due process was offended." *Infra*, p. 10a.

and

> "Even if the transcripts were based on recordings that were inaudible and incomplete, the petitioners have not established that due process was offended at trial." (*Ibid.*)

It described the recordings and transcripts as "cumulative evidence", *infra*, p. 10a and noted that the trial judge had instructed the jury "to weigh the characteristics of audibility and completeness when evaluating the recordings and transcripts." (*Ibid.*)

The District Court denied the application for a writ of habeas corpus and ruled that a certificate of probable cause, requisite for an appeal, would not be issued. Petitioners thereupon filed a notice of appeal with the court below and moved pursuant to 28 U.S.C. § 2253 and Rule 22(b) of the Federal Rules of Appellate Procedure for a certificate of probable cause. That motion, which was denied, is the subject of this petition.

The Questions Are Substantial

1. The use of electronic devices to record the telephone conversations between Roper and Braun and the conversations at the meetings between Roper and the petitioners constituted an unlawful search and seizure, quite aside from

the deficiencies in the use and results of those recordings, *infra,* pp. 7a-10a.

This Court, recognizing the serious impact upon privacy and liberty of such devices, has reversed criminal convictions in both state (*Berger* v. *United States,* 388 U.S. 41) and federal cases (*Katz* v. *United States,* 389 U.S. 347); indeed, in the former case, the invalidated conviction had the support—not present here—of a state statute and of judicial approval pursuant to the statute. See also *Osborn* v. *United States,* 355 U.S. 323.

The Court's approval of the use of recordings in *Lopez* v. *United States,* 373 U.S. 427, *infra,* p. 6a, does not affect petitioners in view of the qualifications suggested in the subsequent opinions in the *Osborn, Berger* and *Katz* cases. But *Lopez,* itself, is clearly distinguishable from the case at bar on several grounds: first, in *Lopez,* there was probable cause to use the electronic device; second, there was involved a government agent who, the Court believed, required protection against being "framed"; and, third, the defendant had knowledge of his governmental status.

(a) There was obviously probable cause to believe that *Lopez* intended, prior to the use of the electronic listening device, to commit the crime with which he was ultimately charged. Petitioners' situation stands sharply in contrast: (i) Braun's repeated solicitation of Roper despite the latter's rebuffs and failure to respond, *infra,* p. 5a and (ii) the District Attorney's recordings of telephone conversations despite Roper's claim of disinterest, *infra,* p. 5a.

The Court's opinion in *Lopez* relates in detail facts sufficient to establish probable cause, although it does not discuss the matter of terms of the constitutional requirement of probable cause. However, the decisions in earlier cases had required the establishment of probable cause as a condition to the validity of a search and seizure, *Agnello* v. *United States,* 269 U.S. 20, 33; *Beck* v. *Ohio,* 379 U.S. 89,

96 (dissenting opinion). See also *Ohio ex rel. Eaton* v. *Price*, 364 U.S. 263, 272 (separate opinion), noting "the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment"; *McDonald* v. *United States*, 335 U.S. 451; *Abel* v. *United States*, 362 U.S. 217, 251-252 (dissenting opinion).

The opinion in the District Court makes no mention of this important distinction between *Lopez* and the instant case. The electronic recording cases which it cites involved situations in which probable cause was clearly established, *United States* v. *Kaufer*, 406 F. 2d 550 (2nd Cir. 1969), *aff'd on other grounds*, 394 U.S. 458; *United States ex rel. Molinas* v. *Mancusi*, 370 F. 2d 601, 603 (2nd Cir. 1967), *cert. denied*, 386 U.S. 984.

(b) This Court emphasized in *Lopez* the existence of other factors absent from this case, *viz*, the governmental status of the agents, the defendant's knowledge of that status and the need to protect the agent against charges of corruption. The point is developed more fully in the concurring opinion of Chief Justice Warren:

> "The only purpose the recording served was to protect the credibility of Davis against that of a man who wished to corrupt a public servant in the performance of his public trust. I find nothing unfair in this procedure." 373 U.S. at 442.

The Chief Justice concluded that he joined with the Court in "permitting the use of electronic devices to corroborate an agent under the particular facts of this case." 373 U.S. at 445.

(c) In *Osborn*, this Court emphasized the strict controls which had been imposed upon the use of the electronic recording devices by the two judges who approved that procedure. In contrast, the uncontrolled use of the electronic device in this case, first, in their installation by

the District Attorney and, second, in their "on and off" use by Braun is the antithesis of the rationale of the several opinions in *Osborn.*

(d) The substantiality of these issues is shown by the contrary decision in two other circuits: *United States* v. *White,* 405 F. 2d 838 (7th Cir. 1969), *cert. granted,* —U.S. —, 37 U.S.L. Week 3379; *United States* v. *Jones,* 292 F. Supp. 1001 (D.D.C. 1968). These cases adopt a substantially different approach to the problem of electronic eavesdropping from that of the court below in this case and in *Kaufer, supra.*

2. Assuming, *arguendo,* that complete, audible and unedited tape recordings could lawfully have been used at the time of petitioners' arrest and trial, the use of the particular electronic devices in the instant case denied petitioners a fair trial and due process of law. For it is not disputed, *supra* p. 4, that the tape recordings were inaudible, incomplete and the product of combined interpretation by the state's witness and the District Attorney.

Whatever may be the validity of electronic devices generally, their use under these conditions denies petitioners a fair trial. The considerations noted in *Lopez* were not met:

> "[T]he device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant . . ." 373 U.S. at 439.
>
> "We think the risk that petitioner took in offering a bribe to Davis fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording." *Ibid.*

The District Court's view that due process was not offended even if the recordings were inaudible and in-

complete cannot be reconciled with this Court's reasons in *Lopez* for permitting their use. A trial court cannot evade its responsibility for a fair trial by letting a jury evaluate and weigh such distorted evidence. Inaudible and incomplete tapes whose transcription has been revised over a long period of time, with the collaboration of the District Attorney, constitute a "very substantial and prejudicial error," to use the criterion noted below *infra,* 10a.

It is apparent that the Court in *Lopez* gave considerable weight to the tapes used in that case. But a condition precedent to according tapes such evidentiary worth is that they be free from inherent defects casting doubt upon their validity. Hence, in *Lopez, supra* at 439, n. 11, this Court stated that "the trustworthiness of the recording is not challenged." Such a challenge was and is made in this case.

3. This case also raises the important issue of whether entrapment does not constitute a denial of the constitutional right to due process, a question which should be decided by this Court. In *Lopez* v. *United States, supra* at 434, the Court stated that "[t]he defense of entrapment, its meaning, purpose and application, are problems that have sharply divided this Court on past occasions." The Court described entrapment as "the *manufacturing* of crime by law enforcement officials and their agents" (*ibid*). There was, of course, no showing in *Lopez* of governmental conduct to induce the accused to commit the crime; the petitioner there had made an unsolicited offer to the federal agent.

In contrast, this case shows so high a degree of importunity on Braun's part, spurred on by the District Attorney, as to constitute a bald incitement to commit crime. It was for this reason that Justice (now Presiding Justice) Stevens dissented in the Appellate Division,

People v. *Roper, et al.*, 24 A.D. 2d 560, 260 N.Y.S. 2d 1008, (First Dept. 1965), upon the petitioner's direct appeal from their conviction, on the ground that the entrapment issue should have gone to the jury.

The District Court was of the opinion that "the defense of entrapment is not required by the federal constitution," *infra*, p. 11a. But this Court has never passed upon this important aspect of criminal due process whose substantiality justifies plenary consideration. See Note, *The Serpent*, etc., 74 Yale L.J. 942 (1965).

The District Court's suggestion that the entrapment issue was primarily one affecting Roper, with whom Braun first dealt *infra*, p. 12a, disregards the reality of the situation: the governmental "manufacturing of crime" was effective and unconscionable, whether executed directly by the District Attorney upon petitioners or indirectly through Braun and Roper. Justice Stevens correctly viewed the entrapment issue as one which all the defendants (including petitioners herein) were entitled to raise, and hence concluded that petitioners should be granted a new trial.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the order of the court below.

Respectfully submitted,

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December 8, 1969.

APPENDIX

Constitutional Provisions Involved

The Fourth Amendment to the Constitution provides that "[t]he right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

The Fifth Amendment to the Constitution provides in pertinent part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. . . ."

The Sixth Amendment to the Constitution provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial by an impartial jury . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defense."

Order of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twelfth day of September, one thousand nine hundred and sixty-nine.

UNITED STATES ex rel. NUNZIO PROVENZANO and SALVATORE BRIGGULIO,

Relators-Appellants,

v.

HAROLD W. FOLLETTE, Warden, Green Haven Prison, and DANIEL MCMANN, Warden, Clinton Prison,

Respondents-Appellees.

It is hereby ordered that the motion made herein by counsel for the relator-appellants by notice of motion dated August 18, 1969 for a certificate of probable cause be and it hereby is denied.

J. EDWARD LUMBARD
J. JOSEPH SMITH
WILFRED FEINBERG
Circuit Judges

Opinion of the United States District Court

UNITED STATES OF AMERICA ex. rel. NUNZIO PROVENZANO and SALVATORE BRIGUGLIO,

Petitioners,

v.

HAROLD W. FOLLETTE, Warden, Green Haven Prison, and DANIEL McMANN, Warden, Clinton Prison,

Respondents.

69 Civ. 274

This is an application for a writ of habeas corpus (28 U.S.C. § 2241) by Nunzio Provenzano and Salvatore Briguglio. At the time the application was filed (January 23, 1969), Provenzano and Briguglio were in custody at Clinton Prison, Dannemora, New York, and Briguglio was in custody at Green Haven Prison, Stormville, New York.)

The trial of the applicants took place in December, 1962 and January 1963 in Supreme Court, New York County. They were convicted by a jury of an attempt to commit grand larceny in the first degree (Penal Law, §§ 2, 1294, as it then stood) along with a co-defendant, Eustace Roper, who is not concerned with this application. Provenzano and Briguglio were sentenced on March 5, 1963 to imprisonment for from two to four years. The convictions were affirmed by the Appellate Division, First Department (24 A.D. 2d 560, 260 N.Y.S. 2d 1008 (1965)) and by the New York Court of Appeals (17 N.Y. 2d 711, 269 N.Y.S. 2d 718 (1966)). Certiorari was denied on October 10, 1966 (385 U.S. 825 (1966)).

Applicants have been released from prison, apparently on parole, since the filing of their application. This does

not defeat the jurisdiction of the Court. *Jones* v. *Cunningham*, 371 U.S. 236 (1963). See also *Carafas* v. *LaVallee*, 391 U.S. 234 (1968).

An application for a writ of error coram nobis was subsequently denied (New York Law Journal, March 19, 1968, at p. 16, col. 4). The order was affirmed on October 15, 1968 by the Appellate Division, Second Department (30 A.D. 2d 1053) and leave to appeal to the Court of Appeals was denied.

Applicants here contend that their constitutional rights were violated in two separate respects: (1) in connection with recordings of conversations with them and receipt in evidence of the transcripts and (2) in connection with their defense of entrapment.

The evidence at trial showed that applicants and Roper (all of whom were union officials) attempted to obtain money from the manager of a New York metals warehouse that was being picketed by representing that they could bribe another union official, Milton Silverman, to enter an "easy" union contract with the picketed business. The name of the manager of the business was Hubert Braun.

There was evidence that in 1961 Local 810 of the International Brotherhood of Teamsters sent Braun a letter requesting that Braun's business recognize the local as the bargaining agent for Braun's employees. Subsequently Braun's business was picketed. Early in September 1961, Braun telephoned Eustace Roper. Roper was a friend of one of Braun's neighbors, and an official of Local 660 of the Teamsters in New Jersey.

During the telephone conversation Braun asked Roper if there was "anything we can do" about the picketing. Roper said that there might be; that it would cost Braun some money for "expenses"; and that he would get in touch with Braun.

Braun then contacted the District Attorney's office. Roper never called Braun back. Milton Silverman did

call Braun. Silverman left a message but Braun did not return the call.

Then with the encouragement of the District Attorney's office, Braun made several attempts to recontact Roper. He finally succeeded in reaching Roper on the telephone on November 30, 1961. This telephone conversation was recorded with Braun's permission.

Roper did not remember who Braun was. After Braun refreshed Roper's collection, Roper suggested that Braun should take his labor problem to the National Labor Relations Board. Braun reminded Roper that a sum of money had been mentioned during the earlier telephone conversation. Roper replied that his efforts to contact someone who could do something about the situation had been unsuccessful, but that he would make further efforts.

After a series of telephone calls between Braun and Roper (all of which were recorded with the consent of Braun) Roper reported success. He said that he had met "these people". Arrangements were made for a face to face meeting between Braun and Roper.

That meeting was held at 1 p.m. on December 4, 1961 at Paul's Bar which is located at 34th Street and Eighth Avenue in New York City. Roper outlined the type of contract and guarantees that Braun would get. He also said that they would cost Braun $10,000. This conversation, and the three subsequent conversations discussed below, were recorded with Braun's consent. A concealed recording device (carried on Braun's body) was used. During the December 4 meeting Braun turned the device on and off so that the entire meeting was not recorded.

On December 8, Braun telephoned Roper and informed him that his business was definitely interested in making arrangements along the lines that they had discussed at the December 4 meeting.

That afternoon at 1 p.m. in the Mermaid Room at the Park Sheraton Hotel in New York City, Braun met with

Roper, Briguglio and Provenzano. Apparently Roper had already discussed Braun's problem with the petitioners. They immediately commenced discussion about the proposed arrangement.

Further negotiations took place at 5 p.m. that afternoon when the same parties met in the Mermaid Room. This time they were joined by Milton Silverman.

On December 11, Braun telephoned Roper and said that he was willing to make a deal under the specific arrangements that had been worked out at the preceding meetings. Another meeting was arranged for the Mermaid Room on December 12 at noon. Braun, Roper, Briguglio, Provenzano and Silverman attended. Braun took only $2,000 to the meeting. After some further negotiations, Briguglio, Provenzano anl Silverman departed. Braun then passed the $2,000 to Roper.

APPLICANTS AND ROPER WERE THEREAFTER ARRESTED

1.

It is first contended that the recording of the four face to face conversations—December 4, December 8 (2) and December 12—violated rights under the Fourth (search and seizure), Fifth (self-incrimination) and Sixth (assistance of counsel) Amendments.

The State objects to considering certain of the claims because they were not raised at trial or improperly raised under coram nobis procedure. The State suggests waiver. It is concluded that the claims were sufficiently indicated at trial to avoid waiver and that, although the State may be correct as to proper coram nobis procedure, the State courts dealt with the claims on their merits and applicants should not be sent to the State courts a second time. *Brown* v. *Allen*, 344 U.S. 443 (1953).

There is no substance to any of the constitutional claims. The contention is that Fourth Amendment rights were violated when conversations with Braun were recorded on the recording device that Braun carried concealed on his body. The Supreme Court rejected a similar contention in *Lopez* v. *United States*, 373 U.S. 427 (1963). There, Lopez contended that his Fourth Amendment rights were violated when an Internal Revenue Agent's testimony that Lopez offered him a bribe was corroborated by a recording made by a device carried by the agent in his pocket. The Court said:

> "Stripped to its essentials, petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory. We think the risk that petitioner took in offering a bribe to Davis fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording" (373 U.S. at 439).

It is suggested that *Lopez* has been overruled by *Katz* v. *United States*, 389 U.S. 347 (1967). This argument was accepted in *United States* v. *White*, 405 F.2d 838 (7th Cir. 1969), cert. granted 37 U.S.L.W. 3379 (April 7, 1969), and apparently was accepted in *United States* v. *Jones*, 292 F. Supp. 1001 (D. D.C. 1968). Our Court of Appeals, however, has rejected the argument and has held that *Katz* did not affect *Lopez* and that *Lopez* is still good law. *United States* v. *Kaufer*, 406 F.2d 550 (1969), affirmed on other grounds, 37 U.S.L.W. 3365 (April 1, 1969).

Even if this Court were not bound by the decision in *Kaufer*, it would still be necessary to reject the argument based on *Katz*. The trial here took place before the decision in *Katz*. The Supreme Court has recently held in *Desist* v. *United States*, 394 U.S. 244 (March 24, 1969) that the *Katz* decision is to be applied prospectively only.

It is suggested that the facts in the case at bar are distinguishable from those in *Lopez*. The suggested distinction is that in this case the applicants did not know that Braun was acting as an agent of the District Attorney's office when the recordings were made whereas in *Lopez* the defendant knew that the man to whom he offered a bribe was an Internal Revenue Agent. The same distinction was discussed, but not ruled upon, in *Osborn* v. *United States*, 355 U.S. 323, 327 n.4 (1966). Our Court of Appeals, however, has explicitly rejected the distinction. *United States ex rel. Molinas* v. *Mancusi*, 370 F.2d 601, 603 (1967), cert. denied 386 U.S. 984 (1967).

The arguments that recording the conversations violated the privilege against self-incrimination and the right to assistance of counsel are on their face without any merit.

2.

It is suggested that introduction of the tapes and written transcripts thereof violated due process.

There certainly was no such objection at trial. Indeed, it appears that applicants consented that the taped recordings be received in evidence. Their objection was only to the transcripts.

The first due process contention is that under Section 813-a of the Penal Law, as it stood in 1961 at the time the tapes were made, the state was required to obtain an order from a state court before engaging in any electronic eavesdropping of conversation. Section 345-a of the Civil Practice Act, which applied to criminal cases at the time of the

trial, is claimed to have forbidden the introduction of recordings into evidence which were obtained in violation of Section 813-a. The contention is that the introduction of the recordings, contrary to Section 345-a of the Civil Practice Act, violated their right to due process at trial.

The statutory sections have been cited in error. The Penal Law did not contain a Section 813-a in 1961 at the time Braun made the tape recordings. The only prohibition in Section 345-a of the Civil Practice Act was against the introduction of evidence obtained in violation of Section 813-b of the Code of Criminal Procedure and of Section 738 of the Penal Law. The recordings and transcripts here involved did not violate either of these sections. Section 813-b of the Code of Criminal Procedure applied only to the interception of telephonic or telegraphic communications. Section 738 of the Penal Law, as it then stood, made it illegal for a person to record a conversation to which he was not a party. Braun was a party to the conversations which he recorded.

The second due process argument is that the recordings were inaudible and incomplete. It is contended that the reception of the recordings (and the transcripts based on them) into evidence was so flagrantly in error that due process was violated.

The contention that the tapes were inaudible and incomplete is based, primarily, on evidence that showed that Braun had difficulty in identifying the voices on the recordings when the transcripts were made and that the transcripts were incomplete (a) substantial portions of the conversations were inaudible on the tapes and therefore were not transcribed and (b) the device was turned on and off during the December 4 conversation so that portions of the conversations were never recorded. As noted above, the petitioners were not present at the December 4 conversation.

Assuming that the tapes were inaudible and incomplete, it must be shown that a very substantial and prejudicial error occurred before there would be any justification in holding that constitutional due process was offended. *Chavez* v. *Dickson,* 280 F.2d 727 (9th Cir. 1960), cert. denied 364 U.S. 934 (1961); *Lisenba* v. *People,* 314 U.S. 219, 236 (1941). There is no such showing here.

It is not contended that the hearings (at which it was determined that the tapes and transcripts were admissible) were unfair. Examination of the trial transcript indicates that such a contention could not be made. The trial judge personally listened to the tapes out of the presence of the jury. Apparently he found that a proper foundation had been laid, because he subsequently permitted the tapes to be received into evidence.

The contention is that the recordings were so incomplete and inaudible that the introduction of the recordings and transcripts into evidence was unfair and violated due process.

Even if the transcripts were based on recordings that were inaudible and incomplete, the petitioners have not established that due process was offended at trial. The recordings and transcripts were cumulative evidence. They were introduced for the purpose of corroborating Braun's testimony. The jury was aware of the contentions for applicants that the transcripts were based on inaudible and incomplete recordings. This came from the extensive voir dire conducted in the presence of the jury. Finally, the trial judge instructed the jury to weigh the characteristics of audibility and completeness when evaluating the recordings and transcripts (Record, Vol. III at 2739). The judge said that these items of evidence are "for you to evaluate and attach to it only such weight as you see fit".

The claim that due process was in any way offended by admission in evidence of the tapes and transcripts must be rejected.

3.

It is contended that there was entrapment here and that a conviction so obtained violates due process. No decision is cited for the proposition that denial of the defense of entrapment violates federal constitutional rights.

It seems clear to me that the defense of entrapment is not required by the federal constitution. A contrary view, but without supporting authority, is put forward in Note, The Serpent, etc., 74 Yale L.J. 942 (1965).

The defense was first recognized by the Supreme Court in *Sorrells* v. *United States,* 287 U.S. 435 (1932), a case dealing with a conviction in a federal c urt. The basis was the intent of Congress not to reach by statute acts instigated by government officers. Justices Roberts, Brandeis and Stone concurred on the ground that as to the defendant in a criminal case, "he has no rights or equities by reason of his entrapment" (287 U.S. at 456) but the doctrine is one of public policy for the protection of the functions of the Court.

The other leading case in the Supreme Court on entrapment is *Sherman* v. *United States,* 356 U.S. 369 (1958). Again the Court unanimously sustained the doctrine, five justices viewing the doctrine as "deriving from the statute" and four as deriving "from a supervisory administration of criminal justice" (356 U.S. at 381).

No justice in either of the two leading cases suggested that the entrapment doctrine derived from the Constitution.

In New York, apparently there was no defense of entrapment prior to the effective date of the new Penal Law —September 1, 1967. Section 35.40 of the new law established the defense; the "Practice Commentary" in McKinney's states that this "is new, since New York did not previously recognize the defense of entrapment". . . .

In affirming the convictions here, there was a dissent at the Appellate Division. Then Justice Stevens felt that the issue of entrapment should have been submitted to the jury, but he appears to have been principally concerned with Roper rather than with these two applicants (260 N.Y.S. 2d 1009-10). The New York Court of Appeals was unanimous that, without deciding whether entrapment was a defense, "the present case did not create an issue of fact requiring submission to the jury" (269 N.Y.S. 2d at 719). The record amply supports this conclusion.

It should be noted that the applicants, as contrasted with Roper, did not even attempt to show entrapment as to them because initially they did not deal with Braun. When they first met Braun on December 4, 1961 at Paul's Bar they immediately commenced negotiating. There is no evidence that they were initially unwilling to negotiate and that Braun somehow persuaded them to abandon this reluctance and therefore entrapped them. Therefore, the only one of the defendants who could in any event claim that Braun entrapped him is Roper, whose case is not before the Court.

The application is in all respects denied. No certificate of probable cause will issue because it is not believed that there are any questions of substance on which the Court of Appeals should rule.

So Ordered.

Dated: June 18, 1969

Inzer B. Wyatt
United States District Judge

Office-Supreme Court, U.S.
FILED
APR 29 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~938~~ 64

NUNZIO PROVENZANO and SALVATORE BRIGUGLIO,

Petitioners,

against

HAROLD W. FOLLETTE, Warden, Green Haven Prison, Stormville, New York and DANIEL MCMANN, Warden, Clinton Prison, Dannemora, New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 938

NUNZIO PROVENZANO and SALVATORE BRIGUGLIO,

Petitioners,

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HAROLD W. FOLLETTE, Warden, Green Haven Prison, Stormville, New York and DANIEL MCMANN, Warden, Clinton Prison, Dannemora, New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Opinions Below

The Court of Appeals wrote no opinion in denying the application for a certificate of probable cause. The order of denial, which is unreported, appears in the Appendix to the petition, p. 2a. The opinion of the District Court is unreported and is set forth in the Appendix to the petition, pp. 3a-12a.

Jurisdiction

The order of the Court of Appeals was entered on September 12, 1969. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. Does federal habeas corpus lie to test a claim that a state conviction is invalid because at trial a recording of a conversation between petitioners and a third party was introduced, when the recording was made by the third party who also testified to the conversation at trial?

2. Assuming *arguendo* that the introduction of such a recording is held to violate due process of law, should such a new rule be announced retroactively by way of federal habeas corpus attacking a final state judgment of conviction?

3. Does federal habeas corpus lie to test the factual assertion that tapes of recorded conversations were so inaudible that their introduction at trial, together with transcripts thereof, denied petitioners a fair trial?

4. Does federal habeas corpus lie to test a claim that petitioners were entrapped especially where the record refutes the claim and where this Court has held that a claim of entrapment does not raise a constitutional issue?

Statement of the Case

a. Procedural History

Petitioners are two former state prisoners* who were charged by a New York County Grand Jury with the crimes of attempted grand larceny by false pretense in the first degree (former N. Y. Penal Law, §§ 2, 1290-a, 1294) and conspiracy to bribe a labor representative (former N. Y. Penal Law, § 380). After trial in the Supreme Court, New York County, they were convicted of the attempted grand larceny charge and sentenced, on March 5, 1963, to terms of from two to four years in prison. The judgments of conviction were affirmed by the Appellate Division (*People* v. *Roper, Provenzano and Briguglio,* 24 A. D. 2d 560 [1st Dept. 1965]), and by the New York Court of Appeals (17 N. Y. 2d 711 [1966]). Certiorari was denied by this Court. *Roper* v. *New York,* 385 U. S. 825 (1966).

Petitioners next sought habeas corpus in the United States District Court for the Southern District of New York alleging that their federally protected rights were violated in that:

1. The introduction against them at trial of recordings made on a Minifon device concealed on the person of one Hubert Braun violated their right to the exclusion of unreasonably seized evidence;

2. The tapes were incomplete and largely inaudible; and,

3. Petitioners were entrapped and the trial court improperly refused to submit the issue to the jury.

---

* Petitioners were in the custody of the respondent Wardens at time they filed their petitions for habeas corpus. Before the decision of the District Court they were conditionally released and have since been released outright. See *Carafas* v. *LaVallee,* 391 U. S. 234 (1968).

Only the second and third claims had been raised by petitioners on direct appeal from the judgments of conviction in the state courts and only the entrapment issue was raised in the petition for certiorari. All of the claims were subsequently raised by way of an application to the trial court for a writ of error coram nobis. The application was denied on March 17, 1968. *People* v. *Provenzano*, N.Y.L.J. March 19, 1968, p. 16, col. 4. The order was affirmed by the Appellate Division, First Department (30 A. D. 2d 1053) and leave to appeal to the Court of Appeals was denied.

By order dated June 18, 1969, the District Court denied the petition for habeas corpus and, on September 12, 1969, the Court of Appeals for the Second Circuit declined to issue a certificate of probable cause to appeal.

b. Facts

Petitioners are two of the original three defendants in this case, the third being one Eustace Roper. All three were union officials who entered into a scheme to obtain money from one Hubert Braun by representing to Braun that they could bribe another union official, Milton Silverman, to enter into an "easy" union contract with Braun's New York architectural metals firm.

On September 6, 1961, Braun telephoned Roper, who was a friend's friend and an official of Local 660 of the Teamsters in New Jersey. Braun told Roper that his firm was being struck by Local 810 of the Teamsters, that a considerable amount of violence and property damage was involved and he feared for his employees' safety. He asked Roper if there was "anything we can do?" (715).* Roper said he would see someone and perhaps it could be "straightened out" adding that "it may cost a couple

* Numbers in parentheses refer to pages in the printed Record on Appeal from the judgment of conviction.

of bucks . . . five hundred or a thousand or so'' for ''expenses'' and saying ''They're a pretty lousy bunch—inclined to play rough'' (715-16). Roper said that he would get in touch with Braun (716). About a week later, Braun received a message that Silverman had called and left a phone number. Braun did not return the call (717). It is obvious from this record that, contrary to petitioners' assertion (Pet. p. 3), it was not Braun who was proposing bribery, but Roper, an undertaking which clearly had no appeal for Braun who did not follow up the opportunity.

During the strike, Detective Bertram L. Scott of the New York City Police went to Braun's premises a number of times and observed incidents which he related to a Mr. Perrin of the office of the District Attorney of New York County (1351). At the request of Mr. Perrin, Braun went to the District Attorney's office (718-19, 1351-52). As a result of his conversation there, Braun tried to reach Roper and succeeded in doing so on November 30, 1961 (721-23). With Braun's permission, the conversation was recorded (724).

Roper told Braun that he had spoken to someone who wasn't interested but said he would try again. He told Braun to call someone at the NLRB ''and I'll work on this angle and you work on yours'' (724). After a series of calls back and forth between Roper and Braun, including one by Braun from, at Roper's suggestion, a public phone booth, Roper told Braun that he had met ''these people'' and, Roper being reluctant to go to Braun's place of business, a meeting was arranged at Paul's Bar at 34th Street and Eighth Avenue. All of the calls were recorded with Braun's permission (732-39).

For his meeting, Braun was, with his consent, equipped with a concealed recording device (743, 759-60). At the meeting, Roper told him that he would get a ''good con-

tract you can live with; the men that you want to get rid of, you name them and the day. He'll get rid of them. You take them back in the meantime" (749). Roper said that Miltie, meaning Silverman, would take care of it and said "[t]hey want important dough" meaning ten thousand dollars (749-50). He added that, in return for the money he (Roper) would see that everything went all right (753).

A second meeting, also recorded by Braun, was held at Roper's suggestion at one o'clock in the afternoon of December 8, 1961 at the Mermaid Room of the Park Sheraton Hotel (765-67). Roper arrived accompanied by the petitioners, Briguglio being introduced as "Sam" and Provenzano as "John" (768-69). This marked petitioners' first overt appearance in the case and they plunged right into the negotiations. When Roper told Braun he was dealing with Silverman, Provenzano told him he had nothing to worry about, that Silverman could be controlled and that the men who could control him had "gotten a hold of him" (769). When Braun said that he did not want the picketers back, which Roper interpreted as a request for guarantees, Briguglio said, "You can guarantee right from the start" (770). Provenzano assured Braun that if he took the men back he could get rid of one every couple of weeks "boom boom" (776-77). Responding to Braun's suggestion that if the money was to go to anyone from 810, that person should be at the table signing, Provenzano said, "You give the money to Ed [Roper] and he knows where it has to go" (780), adding "If you want your guarantees, you'll get them from Miltie himself" (782). He did not want payment by check and said the money was not for 810 but for the record book (792). Briguglio told Braun that he would get the kind of contract he could live with but it wouldn't be on paper (787). Provenzano and Briguglio promised that there would be no more violence (791) and a meeting was arranged by Provenzano with Silverman for five o'clock that same day (783).

When Braun returned to the Mermaid Room, again equipped with a recording device (801), Milton Silverman accompanied Roper and petitioners (800). After some discussion of terms Silverman left and Briguglio, who was angry with Braun for asking so many questions of Silverman, told him to give Roper his answer by five o'clock the following Monday. "Either it is yes or no. If it is no, we bow out of the picture" (803-13).

On Monday, December 11, 1961, Braun called Roper to tell him it was a deal and another appointment was set up at the Mermaid Room for noon the next day (816-17). The next morning, Braun brought $2,000 in twenty dollar bills in a travel brochure to the office of the District Attorney. The numbers of the bills were noted and Braun was equipped with a recording device (818-20). Present at the December 12 meeting were Braun, Roper, Silverman and petitioners (820-22). When, after more negotiations, Silverman started to leave, Braun said that he would like to get the matter settled and Silverman said that he would too because it had been very expensive. Braun said "If you mean the expenses, I have them here" and reached into his pocket (823). Immediately, everybody left the table leaving Braun alone. Roper returned to say he shouldn't have talked to Silverman about money. Silverman came back to say goodbye, told Braun that he was playing with dynamite and left with the two petitioners (824-25). Roper accepted the $2,000 after remarking that the rest was not there (826, 838). He said that petitioners did not want to be at the table when the money was passed (840). Roper was arrested on a pre-arranged signal (827).

Milton Silverman, President of Local 810 of the International Brotherhood of Teamsters testified that Provenzano, whom he had known for 15 years, called him in November, 1961 and expressed an interest in helping Local 810 settle the strike at Braun (258-59). A meeting was held, in late October or early November, with Silverman,

Roper, Provenzano and Briguglio (267). Silverman said he never received any indication that the three intended to bribe him (321-500).

A pre-trial motion to suppress evidence was denied (48-186). The introduction of the recordings and the money passed to Roper by Braun was objected to "on the grounds that it must be contradictory, even from the People's own witnesses, as to whether or not the defendants were actually placed under arrest before the search was made . . . that actually the defendant was not told that he was under arrest prior to the search and seizure which took place" (184-85).

The tapes of the telephone conversations with Roper and the tapes of the meetings and the transcripts prepared by Braun from the tapes, were admitted into evidence, over objection on non-constitutional grounds, after an extensive voir dire. The recordings were played for the jury (1168-1346).

ARGUMENT

None of petitioners' claims raises a substantial question requiring the Court of Appeals to issue a certificate of probable cause.

1. The introduction at trial of the tapes of conversations between petitioners and the person recording the conversations did not violate petitioners' rights under the Fourth and Fourteenth Amendments to the Constitution.

The claim that the introduction of the recordings made by Braun of his conversations with petitioners violated petitioners' right to be free from unreasonable searches and seizures was properly rejected by the Courts below. This case is squarely controlled by *Lopez* v. *United States,* 373 U. S. 427 (1963), involving a bribery charge arising under circumstances very similar to those in the instant case. Recordings were used there to corroborate the offer of a

bribe as to which the offeree could have testified in any event. This Court held that (*id.* at 439):

> "Stripped to its essentials, petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory. We think the risk that petitioner took in offering a bribe to Davis fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording."

In his concurring opinion, Chief Justice Warren, while expressing reservations as to the indiscriminate use of electronic devices, had no difficulty with their use as corroborative of otherwise admissible evidence. *Id.* at 442-45. *Lopez* is still the law. *United States* v. *Kaufer,* 406 F. 2d 550 (2d Cir. 1969), *aff'd* 394 U. S. 458 (1969); *United States* v. *Jackson,* 390 F. 2d 317 (2d Cir. 1968); *United States ex rel. Molinas* v. *Mancusi,* 370 F. 2d 601, 603 (2d Cir. 1967), *cert. denied* 386 U. S. 984 (1967); *Dryden* v. *United States,* 391 F. 2d 214 (5th Cir. 1968).

In their petition to this Court, petitioners attempt to distinguish *Lopez* on the ground that whereas in that case there was probable cause to use the device, in this case there allegedly was not. Petitioners take the District Court to task for failing to deal with this "important distinction" (Pet. p. 7). That Judge Wyatt did not mention the question of probable cause is scarcely surprising. In the first place, petitioners did not mention it. They did not mention it to Judge Wyatt and they did not mention it in the state courts. Their belated interjection of it here simply raises a spurious issue in the wrong forum.

Second, there is no basis in law for the argument. Probable cause is irrelevant since, as this Court held, *Lopez* "involves no eavesdropping whatever in any proper sense of that term." *Lopez* v. *United States, supra,* at 439. As long as Braun had a right to attend the conversations, as he obviously did, he had a right to record them. Contrast *Berger* v. *United States,* 388 U. S. 41 (1967) and *Katz* v. *United States,* 389 U. S. 347 (1967), involving surreptitious surveillance of *all* parties to the conversation which all believed would be private and as to which there was no other testimony. Since, under the circumstances of this case no Fourth Amendment right was involved, the question of probable cause never arises. Certainly *Lopez* never discussed the issue or in any way indicated its relevance.

Third, there is no basis in fact for the argument. Even Braun's recorded telephone conversations with Roper were made after there had been strong indication that a bribe was possible. And certainly by the time petitioners appeared on the scene there was probable cause to believe that a full-fledged scheme was underway.

The petitioners reiterate their contention below that the knowledge that the Agent in *Lopez* was a government employee distinguishes that case from this, a distinction properly rejected by the District Court. *United States ex rel. Molinas* v. *Marcusi, supra,* relying on *Osborn* v. *United States,* 385 U. S. 323 (1966). Moreover, any other result would be inappropriate. The fact that a "party" is in government employ should not be a distinguishing feature. Both Braun and the agent in *Osborn* were open in acknowledging their identity. Both were misleading in their willingness to participate in an illegal scheme. The defendants in *Osborn* had no more belief in the honesty of the agent with whom they dealt than did the petitioners here in the honesty of Braun. Both were wrong and petitioners here

have no more right to complain than the *Osborn* defendants. It should be noted, also, that the fact that there was a Court order in *Osborn* does not mean that it was constitutionally required, nor did this Court indicate that it was.

The cases relied on by petitioners as being inconsistent with this case do not help them. *United States* v. *Jones*, 292 F. Supp. 1001 (D.D.C. 1968), suppressing monitored evidence rests on an overbroad reading of *Katz* v. *United States, supra.* Moreover, it distinguishes *Lopez,* which is indistinguishable from this case, as standing "on its own special facts." 292 F. Supp. at 1010, no. 8. In *United States* v. *White,* 405 F. 2d 838 (7th Cir. 1969), *cert. granted,* —— U. S. ——, 37 U.S.L. Week 3379, the informer who was the conduit for transmission of the conversation did not testify and the Seventh Circuit held that *Katz* controlled.

Petitioners have abandoned their prior substantial reliance on *Katz* apparently because this Court has since held that case not to be retroactive. *Desist* v. *United States,* 394 U. S. 244 (1969). *Katz* bears no relation to this case, but even if it did its effective date would not encompass petitioners who were convicted in 1961 even before *Lopez* itself was decided. If *Katz* itself is to be held to have overruled *Lopez,* or if *Lopez* itself is directly overruled, such decision should not affect these final judgments of conviction. *Desist* v. *United States, supra; Linkletter* v. *Walker,* 381 U. S. 618 (1965).

2. The evidentiary value of the tapes and transcripts does not raise an issue cognizable by way of habeas corpus.

As the District Court correctly held, the attack on the audibility of the transcript does not raise a due process claim in the context of this case. That issue was fully explored at the trial and reviewed on appeal. Thus, the admission of the tapes after a hearing, the adequacy of

which is not challenged, was presumptively correct. 28 U.S.C. § 2254(d); *Townsend* v. *Sain,* 372 U. S. 293 (1963). In any event, the adequacy of the tapes was solely a matter of the state law of evidence, not reviewable here. Finally, petitioners conceded in the state courts that the playing of the recordings was not alone prejudicial, protesting rather the transcripts, the accuracy of which was questioned. But the jury had before them not only Braun's own testimony but that of the three defendants and Silverman, each stating what was said. In addition, there were in evidence drafts of the transcripts depicting earlier efforts to evolve them. Braun and an investigator testified as to how the final transcripts were developed and certified their correctness. The witnesses were cross-examined on these issues and the jury was instructed to give the distributed transcripts such weight only as they might see fit to give them. Under such circumstances, receipt of the transcripts were eminently fair, and petitioners' belated attempts to find in *Lopez* a constitutional requirement that the tapes be flawless in all respects is wholly untenable.

3. Petitioners' claim that they were entrapped is frivolous and raises no constitutional issue.

Finally, petitioners' claim that they were entrapped fails to present a claim cognizable by way of habeas corpus. First, as Judge Wyatt held, the defense of entrapment is not constitutionally required to be extended by a state. *Sherman* v. *United States,* 356 U. S. 369 (1958); *Sorrells* v. *United States,* 287 U. S. 435 (1932). Second, petitioners' basic contention at trial was one of innocence, a claim inconsistent with that of entrapment. The State is not required to permit inconsistent defenses. *Cf. United States* v. *Alford,* 373 F. 2d 508 (2d Cir.), *cert. denied* 387 U. S. 937 (1967).

Further, as the New York Court of Appeals noted: "The present case did not present an issue of fact requir-

ing submission to the jury." 17 N. Y. 2d 711. Braun's "importunity" (Pet. p. 9) consisted of one innocent telephone call to Roper who immediately seized the opportunity to say that money would be required and a subsequent call by Braun, after speaking to the District Attorney, after which Roper undertook an elaborate scheme involving several people unknown to Braun, including petitioners and assumed direction of the entire undertaking without further ado. In dealing with Roper, Braun was not even aware of petitioners' existence. They appeared on the scene one day and participated in the negotiations expressing no reluctance to come back and working hard to persuade Braun of the advantages of the deal. Indeed, they held a meeting with Roper and Silverman prior to their meeting with Braun and it was *Provenzano* who set up that meeting before he had any contact with Braun. How it can be said, in the face of this, that the State or any of its agents entrapped petitioners, surpasses credulity. Braun did not "manufacture" petitioners' crime. *Lopez* v. *United States, supra,* at 434. Petitioners and Roper were ready and willing, without persuasion to enter into the scheme. *United States* v. *Alford, supra.* The fact that a stratagem was employed, in that Braun was not really willing to be bilked, does not create entrapment where, as here, the initial suggestion was made by Roper, extensive negotiations were carried on in Braun's absence by Roper and petitioners and no evidence even of inducement exists with respect to Braun. See *Sorrells* v. *United States, supra; Masciale* v. *United States,* 356 U. S. 396 (1958).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York, March 16, 1970.

Respectfully submitted,

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